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SUPREME COURT OF THE UNITED STATES

No. _____

ROBERT L. STARNES,
Petitioner,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Robert L. Starnes, hereby petitions for a writ of certiorari to review the decision of the Fourth Circuit Court of Appeals made on December 13, 1973 which affirmed the decision of the District Court.

OPINIONS BELOW

The Fourth Circuit Court of Appeals' opinion decided on December 13, 1973 is appended hereto in the appendix. The District

Court made no written opinion. The Judgment of the District Court is appended hereto in the appendix. The opinion of the Fourth Circuit has not been officially reported at this time.

JURISDICTION

The order sought to be reviewed was made and entered on December 13, 1973. No petition for rehearing was made nor was there any extension granted to file this petition for certiorari. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 U. S. C. Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Is it proper for a Court in a jury trial under the Federal Boiler Inspection Act to permit a railroad to question a railroad employee about the nature of his bank deposits when such questioning compels the railroad employee to disclose before the jury that he has been receiving Railroad Retirement Benefits?

2. Is there any requirement under the Federal Boiler Inspection Act to show the extent rather than just the presence of foreign matter on a locomotive or engine and has a railroad employee met the requirements of the Federal Boiler Inspection Act by showing the presence of foreign matter on a locomotive or engine?

STATUTE INVOLVED

"It shall be unlawful for any carrier to use or permit to be used on line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28 to 30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." (See Title 45 U. S. C. A. Railroads Section 23, page 151 commonly known as the Federal Boiler Inspection Act).

STATEMENT OF THE CASE

The petitioner, an employee with the Norfolk and Western Railway Company, filed a complaint under the Federal Boiler Inspection Act alleging that he was injured while in the employ of the Norfolk and Western. The United States District Court in Norfolk had jurisdiction pursuant to Title 45 U. S. C. A. "Railroads" Section 56, page 296. The jury returned a verdict for the respondent, Norfolk and Western Railway, and the District Court entered judgment on the verdict. (see App. 1) The Fourth Circuit of Appeals affirmed the

decision of the District Court (see App. 2).[1]

Robert L. Starnes had been employed with the Norfolk and Western as a fireman and engineer for approximately fifteen years (App. on Appeal 60, 61). On April 25, 1971 Starnes reported to the empty yard at Lambert's Point, Norfolk, Virginia at 8:00 A. M. to work the eight to four shift (App. on Appeal 61). Starnes was the engineer, Bocock was the fireman (App. on Appeal 21), Trigleth was the conductor (App. on Appeal 45) and Mills and Henson were the brakemen (App. on Appeal 45). The crew's job that day was to make up trains of empty hoppers for their return to West Virginia (App. on Appeal 53).

When the crew picked up the locomotive (engine) that day they observed that the cab of the locomotive (engine) had not been cleaned (App. on Appeal 65, 101). The locomotive (engine) cab was described as being in a trashy condition (App. on Appeal 22). There were peanut shells, paper trash, dust, loose debris and dirt on the floor of the cab (App. on Appeal 22, 62). Starnes found a broom and swept out the center of the cab to the best of his ability (App. on Appeal 62, T-149). Evidence showed that locomotives (engines)

[1]Reference will be made in the following manner (App. on Appeal) means the printed appendix on appeal; (T -) means trial transcript; (App.) means appendix in petition for certiorari.

at the main yard were serviced and cleaned after each shift (App. on Appeal 65), but locomotives (engines) at the empty yard were not serviced and cleaned as often (App. on Appeal 127). This locomotive (engine) had not been serviced and cleaned after the shift that worked prior to Starnes (App. on Appeal 27, 37).

Starnes operated the locomotive (engine) when he first reported to work on April 25th, 1971. At 10:30 A.M. Starnes switched with Bocock, the fireman, who then operated the engine from the engineer's seat or side (App. on Appeal 22, 47, 67). Starnes was then seated in the fireman's seat (App. on Appeal 29, 47). The locomotive (engine) was stopped on Track 32 as Henson had just finished opening several knuckles or missed couplings on Track 31 (App. on Appeal 29, 46). The entire crew was in the cab of the locomotive (engine).

Starnes then told Bocock to hold the engine because he wanted to get on the running board so he could go to the bathroom (App. on Appeal 70). Starnes opened the fireman's door and put his right foot on the threshold of the door (App. on Appeal 71). Evidence showed that the threshold or sill was 2 1/2 inches wide and 7/16ths of an inch above the floor (App. on Appeal 126). The threshold could not be observed when the door was closed (App. on Appeal 74). The right foot of Starnes slipped with his heel catching the threshold (App. on Appeal 71). Both of Starnes feet went out from under him and he

fell out the fireman's door with his back hitting the threshold of the door (App. on Appeal 71). Starnes was able to catch a grab iron and stop his fall (App. on Appeal 71). Several members of the crew inside them helped Starnes back into the cab. Starnes was wearing clothing and shoes in conformity with Norfolk and Western's rules.

None of the crew actually saw Starnes slip, but several saw him falling out the doorway (App. on Appeal 30, 58). After Starnes fell, the crew noticed sand on the threshold (App. on Appeal 31, 49, 59, 60, 71). There was powdery ground up sand on the threshold (App. on Appeal 83). Bocock saw a deposit of loose and fine sand (crushed sand) in the doorway and threshold (App. on Appeal 31, 32, 42) with dirt also accumulated near the doorway (App. on Appeal 31). The threshold or sill was clear where Starnes had slipped, but had dust on either side (App. on Appeal 59).

No one had used the fireman's door prior to Starnes that morning (App. on Appeal 33, 57, 66, 74) and the fireman's door was closed when Starnes reported to work on the morning of the 25th (App. on Appeal 66).

The Norfolk and Western maintained that Starnes slipped because he hooked his heel on the sill, that there was no sand on the sill, and that it is normal to have some accumulation of sand in the cab. Norfolk and Western also attacked the credibility of Starnes.

Guy C. Kelly, the road foreman of engines, and trainmaster who took Starnes to the emergency room, maintained that Starnes said nothing to him about sand on the threshold (App. on Appeal 112, 113). Bundy, a junior engineer who inspected the cab shortly after Starnes' fall, indicated that he only took one exception to the condition of the cab - a newspaper on the floor (T-170). Emory Mutter, a machinist, found nothing to report (App. on Appeal 115) and Ralph White indicated that the sill was in normal condition (App. on Appeal 117, 118).

Norfolk and Western recalled Starnes as a witness (App. on Appeal 130). Starnes admitted that he had worked some odd jobs and had done some bookkeeping since April 25, 1971 (App. on Appeal 141). Starnes denied that he had steady income since November of 1971 (App. on Appeal 141). Norfolk and Western then inquired as to whether Starnes had been making steady deposits in his bank account (App. on Appeal 141). Counsel for Starnes objected. Out of the presence of the jury, Norfolk and Western showed Starnes his checking account records from November of 1971 until September of 1972. Starnes indicated that he had been receiving Railroad Retirement every two weeks (App. on Appeal 145) and couldn't recognize which deposits were from Railroad Retirement (App. on Appeal 146). The Court ruled that Starnes could be questioned about his deposits, but no mention should be made of Railroad Retirement (App. on Appeal 148). Counsel for Starnes objected because a number of the

deposits represented Railroad Retirement (App. on Appeal 148) and that permitting Norfolk and Western to examine Starnes about the deposits forced before the jury evidence of Railroad Retirement (App. on Appeal 151).

In the presence of the jury, Starnes was again asked that if since November of 1971 he had a steady stream of deposits into his checking account (App. on Appeal 152). Starnes replied that he had made six deposits between November of 1971 until he went back to work in January of 1972 (App. on Appeal 152). Starnes also admitted that after being discharged from the Railroad his deposits averaged four or five a month (App. on Appeal 152). Norfolk and Western then asked:

By Mr. Prince:

Q. Now, can you tell us where all of this income has come from that you have been depositing? (App. on Appeal 153) (Emphasis Added)

By Mr. Starnes:

A. Well, some of it is from loans that I had made at the bank; some of this is from railroad sickness benefits. At one period of time...I don't believe that's on here... (App. on Appeal 153).

By Mr. Prince:

Q. And then sometimes from railroad

sickness benefits?

By Mr. Starnes:

A. Yes, sir (App. on Appeal 156).

During the presentation of instructions to the Court, Starnes objected to Norfolk and Western's charge referring to the small amount of sand (App. on Appeal 9). The Court recognized that this was a proper objection (App. on Appeal 9). The jury was then instructed as to whether the existence of the sand put the locomotive in an unsafe condition (App. 6, 7).

However, after the jury had been deliberating, it returned to the jury box to ask the Court whether the design of the fireman's door complied with the Boiler Inspection Act. The Court stated that the design did comply and then said:

> "The sole question you have relates to the question of sand, if any, and the extent of the sand, and so on, on the steps and threshold." (Emphasis Added) (App. on Appeal 12).

Counsel for Starnes objected to the trial Court instructing the jury on the extent of the sand (App. on Appeal 13). After this instruction by the Court, the jury returned a verdict for Norfolk and Western eight minutes later (App. on Appeal 2).

REASONS FOR GRANTING WRIT

First of all, this Court has held that the admission of evidence of Railroad Retirement benefits or other collateral benefits in a trial for personal injury is prejudicial error no matter what the purpose was for showing the receipt of Railroad Retirement benefits. See Eichel v. New York Central Railroad Co. 375 U.S. 253, 84 S. Ct. 316, 11 L. Ed 2d 307 (1963). See Tipton v. Socony Mobil Oil Co., Inc. 375 U.S. 34, 37 84 S. Ct. 1, 11 L. E. 2d 4 (1963). In Eichel v. New York Central Railroad Co., supra, p. 317, the Supreme Court stated in a per curiam opinion that evidence of Railroad Retirement had to be excluded even for impeachment purposes.

> "In our view the likelihood of misuse by the jury clearly out weighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension. Moreover, it would violate the spirit of the federal statutes if the receipt of disability benefits under the Railroad Retirement Act of 1937 50 Stat. 309 as amended, 45 U.S.C. Section 228B (a) 4 were considered as evidence of malingering by an employee asserting a claim under the Federal Employers' Liability Act..."

> "Similarly, we must recognize that the petitioner's receipt of collateral, social insurance benefits involves a substantial likelihood of prejudicial impact."

Other Circuits have held that it was prejudicial error to introduce Railroad Retirement benefits to attack an employee's credibility and his motive not to return to work. See Caughman v. Washington Terminal Company 345 F. 2d 434 (D. C. Circuit 1965). This Court has even held that evidence of collateral benefits is prejudicial error where the jury gave a defendant's verdict and never reached the issue of damages. See Tipton v. Socony Mobil Oil Co., Inc., supra, page 3 where the Supreme Court stated

> "We disagree with the suggestion of the Court of Appeals that the prejudicial affect of the evidence of other compensation would be restricted to the issue of damages, and would not affect the determination of liability."

The cautioning charge of the District Court Judge telling the jury to disregard the evidence of Railroad Retirement does not render the error harmless. See Page v. St. Louis, South-Western Railway Co. 349 F. 2d 820 (5th Cir 1965).

Starnes did not voluntarily inject Railroad Retirement before the jury. The evidence of Railroad Retirement came in after Starnes had objected to questioning about

his bank deposits because it would bring before the jury evidence of Railroad Retirement benefits and only when Starnes replied to a question of the Norfolk and Western asking where all of his income has come from. Even though Starnes himself mentioned Railroad Retirement benefits, the answer was required by the question of Norfolk and Western. Certainly the decisions of this Court which prohibit evidence of Railroad Retirement for any purpose cannot be circumverted by allowing a railroad to ask a question which requires the employee in his answer to mention Railroad Retirement benefits and then say there is no error since the employee voluntarily brought Railroad Retirement before the jury.

Secondly, neither the Federal Boiler Inspection Act nor any case law requires an employee to show the extent of a foreign substance on a locomotive or any part in order to prove a violation. Here the trial Court's instruction to the jury that they had to be concerned with the extent of the sand was contrary to the requirements of the Federal Boiler Inspection Act.

In Lilley v. Grand Trunk R. Co. 317 U. S. 481, 63 S. Ct. 347, 87 L. Ed. 411 (1942), the Supreme Court found that a tender covered with ice where employees must climb involved unnecessary peril to life or limb. The Supreme Court specifically stated that negligence is not the basis of a suit under FBIA and that the FBIA "imposes upon the carrier an absolute and continuing duty to maintain the locomotive and all parts and appurtenances

thereof in proper condition and safe to operate. ..without unnecessary peril to life or limb." Lilley, supra. Under this Act no notice to the railroad, either constructive or otherwise, is required and it makes no difference whether the condition arises along the way while the locomotive is in use. See McCarthy v. Pennsylvania R. Co. 156 F. 2d 877 (7th Cir, 1946). None of the cases under the Federal Boiler Inspection Act have gone into the question of the amount of foreign matter, or required an employee to prove the extent of the foreign matter. See St. Louis, Southwestern Railway Company v. Williams 397 F. 2d 147 (5th Cir 1968) where the Court found there was sufficient evidence to support a violation of the FBIA where the employee slipped on oil on some steps. In Gowins v. Pennsylvania R.R. 299 F. 2d 431 (6th Cir. 1962), the Court held that the Act gives protection against the presence of dangerous objects or foreign matter. See also Annot. 90 A.L.R. 2d 599 and supplements. In Calabritto v. New York, New Haven and Hartford R. Co. 287 F. 2d 394 (2nd Cir. 1961), the Circuit Court held there was liability for the dangerous condition caused by the temporary presence of foreign matter.

> "So the use of an engine whose surface has been made slippery by sand and oil may similarly be found by a jury to involve unnecessary peril to life or limb in violation of the FBIA."

CONCLUSION

Petitioner submits that this Court should grant certiorari in order to insure that its previous rulings excluding evidence of Railroad Retirement benefits are not circumvented by the practice of asking a question which compels the railroad employee to disclose before the jury the fact that he has been receiving Railroad Retirement benefits. Secondly, the decided case law by this Court and other Circuits throughout the country only requires an employee to show that the presence of foreign matter and not the extent of foreign matter made the locomotive in an improper condition and unsafe to operate thereby exposing the petitioner to unnecessary peril. The trial Court's instruction to thejury telling them to be concerned with the extent of sand was contrary to the meaning of the Federal Boiler Inspection Act.

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Raymond H. Strople

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CERTIFICATE

I hereby certify that three printed copies of the Petition for a Writ of Certiorari in the case of Robert L. Starnes v. Norfolk and Western Railway Company were deposited in the United States mail, first class, prepaid to William T. Prince, Esq. at his office of Williams, Worrell, Kelly and Worthington, P. O. Box 3416, Norfolk, Virginia 23514 on the 22 day of February, 1974. It is further stated that the petition has been served on all parties.

Raymond H. Strople

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

ROBERT L. STARNES,

Plaintiff,

v.

CIVIL ACTION NO.
76-72-N

NORFOLK AND WESTERN
RAILWAY COMPANY,

Defendant.

FINAL JUDGMENT

Upon consideration of the plaintiff's motion to set aside the verdict of the jury heretofore rendered on October 12, 1972, in favor of said defendant, and upon further deliberation following the argument of counsel on June 8, 1973, it is

ORDERED that the plaintiff's motion to set aside the verdict of the jury be, and the same hereby is, DENIED, and final judgment is hereby rendered in favor of the defendant with costs assessed against the plaintiff.

The plaintiff duly excepts to the ruling of the Court in this matter.

The Clerk will forward certified copies of this final judgment order to Dennis F. McMurran, Esquire, and William T. Prince,

Esquire, counsel of record for the respective parties.

Walter E. Hoffman
United States District Judge

At Norfolk, Virginia
June 8, 1973

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-2021

ROBERT L. STARNES,

Appellant,

v.

NORFOLK AND WESTERN RAILWAY COMPANY,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.
Walter E. Hoffman, District Judge

(Argued December 3, 1973. Decided December 13, 1973)

Before BUTZNER and FIELD, Circuit Judges,
and TURK, District Judge

Raymond H. Strople (Dennis F. McMurran and Moody, McMurran and Miller on brief) for appellant; William T. Prince (Williams, Worrell, Kelly and Worthington on brief) for appellee.

Per Curiam:

Upon consideration of the briefs, record and oral argument, we find no reversible error.

AFFIRMED.